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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CB PARRISH, Plaintiff and Appellant, v. MARILYN D. LITTLE, Defendant and Respondent.	A153961 (Lake County Super. Ct. No. CV417316)

This appeal concerns a dispute over a family trust. Appellant CB Parrish sued her sister, Marilyn Little, under two breach of contract theories. The first cause of action alleged that a 1999 amendment to a family trust that left the parents' estate entirely to Little breached the parents' written and oral agreements with Parrish to leave her half of their estate. The second cause of action, asserted under a third party beneficiary theory, alleged that Little breached an oral agreement with the parents to distribute half of their estate to Parrish upon both of their deaths. The trial court sustained Little's demurrer to both causes of action without leave to amend. For the reasons discussed below, we reverse.

BACKGROUND

In 1985 trustors Raphael and Barbara Lopes (parents) established an inter vivos trust that named themselves as trustees, named Little and Parrish (daughters) as successor co-trustees, and directed that the residue of their estate was to be divided equally between the daughters upon the death of the surviving trustor.

In May 1999 the parents amended the provision of the trust governing disposition of the estate to provide as follows. "Termination: Upon the death of the surviving trustor, the trustee shall distribute the remaining balance of the trust estate . . . to such one or more descendants of the trustors, either outright or in trust and on such terms and conditions, as the surviving trustor may appoint by a provision in his or her valid last will specifically referring to and exercising this limited power of appointment. *Any balance of the trust estate not effectively appointed in that manner shall be distributed to* [*Little*], *outright and not in trust, with the hope and desire that she will use a maximum of one-half* (*1/2*) *of the property so distributed as needed to provide her sister,* [*Parrish*], *with reasonable and adequate care and medical treatment for the balance of her sister's life.* If [Little] does not survive the surviving trustor and [Parrish] does survive the surviving trustor, such unappointed balance of the trust estate shall instead be allocated to the Trust for [Parrish] described in Article 4 of this Trust Agreement." (Italics added.)

At the same time the parents modified the trust's successor trustee provision to provide that Little would become the sole trustee after both of their deaths. Bank of America would become the successor trustee if Little were unavailable.

Raphael Lopes died in 2010. Barbara Lopes died on December 31, 2016. On January 31, 2017, Little's attorney sent Parrish a letter informing her of the terms of the trust and, specifically, that the 1999 amendment "excludes you from being a direct beneficiary of the trust assets as long as your sister Marilyn survived your parents. The Trust agreement, as amended, indicates that your sister Marilyn is to receive all of the assets and that she may distribute as much of it, as she wishes to you, up to one-half. It is entirely within Marilyn's discretion for you to receive any of the assets of the Trust."

On May 22, 2017, Parrish filed this action against "Lopes Family Trust, Marilyn D. Little, Successor Trustee." The complaint alleged that in 1985 Parrish and the parents agreed that "[a]s an equal beneficiary of the Lopes Family Trust, [Parrish] would handle the sale of their property in Novato, research and perform everything necessary to convert the rental unit thereon into a separate property to be used as a rental." Parrish alleged that from 2004 through 2014, "[a]s an equal beneficiary of the Lopes Family Trust, I would

do all the legwork to purchase another residential property for the Lopes Family Trust. In all instances assured [*sic*] that I was to inherit per the 1985 trust agreement." According to the complaint, "Defendant" breached the agreement by "[c]reating an amendment to the Lopes Family Trust, the terms of which were undisclosed to me, and having me do the legwork for another property in late 2004 and early 2005. At all times both original Trustors led me to believe I was still to inherit my half of their estate as in the 1985 trust agreement, the only change being that [Little] had to be made 'executor' pursuant to changes in family trust laws. At no time did either tell [*sic*] about the 1999 amendment."

On August 11, 2017, after conferring with Little's attorney, Parrish filed a first amended complaint for breach of contract that named "Marilyn D. Little, as Trustee of the Lopes Family Trust," as the defendant.[1] In the first cause of action, for breach of contract, Parrish alleged that on or about May 3, 1999 Little breached the 1985 family trust agreement and "oral agreements for me to do work to enhance its value" by "[m]aking an amendment to the Lopes Family Trust that effectively disinherits me, without asking me as to the need for it, or informing me that they had done it, leaving me living, working and relying on the Lopes Family Trust as originally shown to me in 1985."

In the second cause of action, Parrish alleged that on and after May 3, 1999 the parents and Little agreed that Little "would give me my half of their estate, the 1999 amendment to the family trust having been written solely in the [mistaken] belief that this would protect me from losing my inheritance to government agencies." Parrish alleged Little breached the agreement on January 1, 2017 by "[n]otifying me through her attorney of my mother's death a month after the fact and offering to give me title to the mobile home in which I live; refusing to see me or talk to me for no reason ever articulated to me, hanging up on calls, treating me with contempt and disregard, and that any communication about the trust should come through my attorney to hers."

[1] Parrish was and is self-represented.

In a 15-page narrative attached to her form complaint, Parrish addressed her relationship with her parents (close and positive) and sister (estranged and adversarial). Parrish stated that in 2003 the parents told her that, because of changes to the trust laws, they had to name Little executor to prevent Medi-Cal from seizing Parrish's inheritance. Parrish understood this to mean Little would receive a fee for acting as executor, but Parrish would still inherit half of the estate. Parrish told the parents their concern about Medi-Cal was unfounded. She understood that the type of benefits she received were not "the means-tested kind," but did not pursue the issue with the parents because "it didn't seem to make a difference as the situation was described to me." In all the years after informing her of the change Parrish's parents never indicated they had effectively disinherited her. To the contrary, they assured her numerous times that she would "get [her] half of their estate." Parrish was certain her parents did not intend to disinherit her.

Little demurred. She asserted the first cause of action was defective because it named her in her personal capacity, not as successor trustee of the family trust. In her personal capacity Little was not a party to the alleged written and oral contracts between Parrish and the parents, so she could not be sued for their breach. In addition, Little asserted the complaint failed to plead whether the alleged agreement was written, oral or implied; that it was fatally uncertain; and that it was barred by the statute of limitations.

As to the second cause of action, Little asserted the action was barred by the parol evidence rule because its allegation that there was an unwritten agreement to distribute half of the estate to Parrish directly contradicted the 1999 amendment to the trust agreement.

The court sustained the demurrer without leave to amend in "reli[ance] on the legal authority and arguments contained in defendant's reply brief," apparently referring to Little's status as a non-party to the alleged contracts and the parol evidence rule's bar against extrinsic evidence to contradict the terms of a written contract. Parrish's subsequent motion for reconsideration was denied on the grounds that it was untimely and failed to show new or different facts or law.

Parrish filed a timely appeal from the judgment of dismissal.

DISCUSSION

I. Legal Standards

"A demurrer tests the legal sufficiency of the complaint, and the granting of leave to amend involves the trial court's discretion. Therefore, an appellate court employs two separate standards of review on appeal. [Citations.] The complaint is reviewed de novo to determine whether it contains sufficient facts to state a cause of action. [Citation.] The properly pleaded material factual allegations, together with facts that may be properly judicially noticed, are accepted as true. Reversible error exists if facts were alleged showing entitlement to relief under any possible legal theory." (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 321-322 (*Roman*).)

"Where a demurrer is sustained without leave to amend, the reviewing court must determine whether the trial court abused its discretion in doing so. [Citations.] It is an abuse of discretion to deny leave to amend if there is a reasonable possibility that the pleading can be cured by amendment. [Citation.] Regardless of whether a request therefore was made, unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion. [Citation.] The burden is on the plaintiff to demonstrate how he or she can amend the complaint. It is not up to the judge to figure that out. [Citation.] Plaintiff can make this showing in the first instance to the appellate court." (*Roman, supra,* 85 Cal.App.4th at p. 322.)

II. First Cause of Action

As in the trial court, Little asserts the first cause of action failed to state a cause of action for breach of contract against her because she was not a party to the alleged agreements between Parrish and the parents. It is true, as Little argues, that an individual defendant generally cannot be held liable for breach of a contract to which he or she is not a party. But this case presents a different situation. The complaint alleges the parents, the original trustors and trustees of the family trust, entered and breached oral and written agreements with Parrish. It names Little as the defendant in her capacity as their successor trustee. Little has made no claim she is not a proper defendant in that capacity. "A trust itself cannot sue or be sued. [Citation.] 'As a general rule, the trustee is

the real party in interest with standing to sue and defend on the trust's behalf. [Citations.]' [Citation.] 'A claim based on a contract entered into by a trustee in the trustee's representative capacity, . . . may be asserted against the trust by proceeding against the trustee in the trustee's representative capacity. . . .' (*Portico Management Group, LLC v. Harrison* (2011) 202 Cal.App.4th 464, 473; Prob. Code, § 18004.)

While Little concedes the complaint's caption identifies her as a defendant in her representative capacity, she asserts that "the only defendant mentioned in the FAC is Respondent personally" because, apparently, Parrish did not expressly denote her trustee capacity whenever Little is mentioned in the body of the form complaint. The assertion is meritless. In reviewing the sufficiency of a complaint against a general demurrer "we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Here, the caption unequivocally identifies the defendant as "Marilyn D. Little, as trustee of the Lopes Family Trust." Taking into account the complaint as a whole (see *Nelson v. East Side Grocery Co.* (1915) 26 Cal.App. 344, 347), that identification is no less plain simply because it is not consistently repeated throughout the body of the complaint.

Little asserts in a footnote that the demurrer was also properly sustained on the independent grounds that the complaint failed to specify whether the alleged contract was oral or written, was indefinite and uncertain, and was time-barred. We will treat these claims as forfeited because they are unsupported with any legal analysis or authority. (*Los Angeles Unified School Dist. v. Casasola* (2010) 187 Cal.App.4th 189, 212 [failure to provide legal argument forfeits issue on appeal]; *People v. Stanley* (1995) 10 Cal.4th 764, 793 [if a point does not include legal analysis, the court may pass it as waived]; Cal. Rules of Court, rule 8.204(a)(1)(B).) The order sustaining the demurrer as to the first cause of action must be reversed.

III. Second Cause of Action

The second cause of action was brought under a third-party beneficiary theory and alleged that Little breached her oral agreement with parents to distribute half of their estate to Parrish. Little argues, and the trial court found, that this cause of action was

barred by the parol evidence rule because the alleged oral agreement directly contradicts the express terms of the contemporaneous written trust amendment. Such was the state of the law prior to *Estate of Duke* (2015) 61 Cal.4th 871 (*Estate of Duke*), but it is not so now.

In *Estate of Duke*, *supra*, 61 Cal.4th 871 the Supreme Court reexamined and rejected the historic rule precluding the use of extrinsic evidence to correct a mistake in the expression of a testator's intent in an unambiguous will. As the starting point for its analysis, the Court explained "extrinsic evidence is admissible to correct errors in other types of donative documents, even when the donor is deceased." (*Id.* at p. 886.) The Court cited in support of this established principle cases involving both irrevocable trusts and revocable inter vivos trusts, as well as cases in which contracts, insurance policies and deeds to property were reformed to correct drafting errors. (*Id.* at p. 887.) The Court concluded that no sound basis exists not to extend this general rule to permit reformation of wills and other donative documents in appropriate circumstances, and that imposing a burden of proof by clear and convincing evidence would adequately address concerns related to the circumstances that the principal witness (the testator) was deceased and not all statutory formalities required for the creation of a valid will were followed. (*Id.* at pp. 889-893.) "[I]f a mistake in expression and the testator's actual and specific intent at the time the will was drafted are established by clear and convincing evidence, no policy underlying the statute of wills supports a rule that would ignore the testator's intent and unjustly enrich those who would inherit as a result of a mistake." (*Id*. at p. 896.) Accordingly, under *Estate of Duke* "an unambiguous will may be reformed to conform to the testator's intent if clear and convincing evidence establishes that the will contains a mistake in the testator's expression of intent at the time the will was drafted, and also establishes the testator's actual specific intent at the time the will was drafted." (*Id*. at pp. 875, 879, 898.)

Little did not address *Estate of Duke* in the trial court. On appeal she seems to argue its holding is limited to holographic wills alleged to contain drafting errors concerning the distribution of assets. If that is her argument, it is meritless. Neither the

holding in *Estate of Duke* nor the Court's comprehensive analysis of the considerations implicated by permitting extrinsic evidence to reform an unambiguous will or other donative document supports the proposed distinction.

Equally unpersuasive is Little's suggestion, as we understand it, that the parents' alleged intent that each daughter receive half of the estate is insufficiently specific to fall within the rule announced in *Estate of Duke.* To the contrary, just as in *Estate of Duke,* the allegations "are precise with respect to the error and the remedy." (*Estate of Duke*, *supra*, 61 Cal.4th at p. 897.) Parrish alleges the parents intended that their estate would be divided equally between their daughters, and " '[t]he remedy in such a case has exactly the dimensions of the mistake. The term that the testator intended is restored.' " (*Ibid*.)

Accordingly, the demurrer was sustained in error as to both causes of action. In light of this conclusion we need not address whether the trial court abused its discretion when it denied leave to amend.

DISPOSITION

The judgment is reversed and the case is remanded to the trial court for further proceedings. Appellant is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

_____
Siggins, P.J.

WE CONCUR:

_____
Petrou, J.

_____
Wiseman, J.*

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.